IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1116

SHELL OIL COMPANY,
Petitioner,

v.

GEORGE DEUKMEJIAN, Attorney General,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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v.

EVELLE J. YOUNGER, Attorney General,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Shell Oil Company ("Shell") hereby prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit filed November 28, 1978. The fundamental issue in this case is whether the Supremacy Clause continues to place any restraint on the states in their enactment of legislation which is egregiously anticompetitive and in conflict with the Congressional purposes underlying enactment of the Sherman Act—this Nation's "comprehensive charter of economic liberty," *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 4 (1958)—and with Section 2(b) of the Robinson-Patman Act. The

focal point of the petition is the extent and breadth of that section of this Court's decision in *Exxon Corp.* v. *Governor of Maryland*, —— U.S. ——, 98 S.Ct. 2207, 2215-18 (1978), which addressed those two federal acts —the sole authority relied upon by the Court of Appeals. At issue here, however, is a competitive situation where there is price competition for sales to the *same purchaser*, a situation which was not decided by *Exxon*. *Id.* at 2215 n.19.

OPINIONS BELOW

The Order of the District Court for the Northern District of California granting summary judgment for plaintiff Shell Oil Company is reported at 1976-1 Trade Cas. ¶ 60,960 (N.D. Cal. 1976), and is reproduced in the accompanying Appendix at 1a. The *per curiam* Opinion of the Court of Appeals for the Ninth Circuit reversing the judgment of the District Court is not yet reported, but is reproduced in the accompanying Appendix at 6a.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered November 28, 1978. Upon motion by Shell, the Court of Appeals entered an Order on December 20, 1978, staying its mandate to permit Shell to file a petition for a writ of certiorari with this Court on or before January 15, 1979. This Order is reproduced in the accompanying Appendix at 11a. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1) (1976).

QUESTIONS PRESENTED

Whether There Are Any Principled Limits on the Power of a State Legislature to Directly Regulate Competition *Qua* Competition by Placing Strict Limitations on Pricing Conduct, Which Limitations Produce Anticompetitive Effects.

A. Whether the Court of Appeals Erred in Uncritically Applying the Broad Language of the *Exxon* Decision Regarding the Purposes of the Sherman Act and Not Limiting That Decision by the Principles of the State Action Doctrine of *Parker* v. *Brown*.

B. Whether the Court of Appeals Erred in Refusing to Apply State Law and State Policy as Expressed in a Very Recent Decision of the California Supreme Court that Adopted the Policy of the Sherman Act as the Policy of California.

C. Whether the Court of Appeals Erred in Uncritically Applying the Broad Language of the *Exxon* Decision Without Conducting an Inquiry into the Degree of Antagonism Between the Purposes of the Sherman Act and the Effects of the California Statute.

D. Whether the Court of Appeals Erred in Uncritically Applying the Broad Language of the *Exxon* Decision When the California Statute Encompassed the Competitive Situation of Sales to the Same Customer—a Situation that Was Not Addressed or Decided in *Exxon*.

STATUTES INVOLVED

The following statutes are involved in this petition for certiorari:

(1) California Assembly Bill 950, codified as Chapter 8, Division 8, of the California Business and Professions Code, §§ 21200-21203, reproduced in the accompanying Appendix at 12a;

(2) The Sherman Act, 15 U.S.C. § 1 *et seq.* (1976), reproduced in the accompanying Appendix at 14a;

(3) Section 2 of the Clayton Act, as amended by Section 2 of the Robinson-Patman Act, 15 U.S.C. § 13 (1976), reproduced in the accompanying Appendix at 15a.

STATEMENT

A. Nature of the Question Presented

In its essence, this petition presents the question whether the Supremacy Clause, and the Sherman Act and Section 2(b) of the Robinson-Patman Act, continue to place any restraint on the states in the enactment of legislation that directly restrains competition, as competition, and imposes severe restraints on pricing conduct. Specifically, the petition seeks an adjudication whether the California legislature, through Chapter 8, Division 8 of the California Business and Professions Code (hereinafter "Chapter 8" or "California statute"), may prohibit free and open price competition in the sale of motor vehicle fuels in a manner which conflicts with the purposes of the Sherman Act, as well as with Section 2(b) of the Robinson-Patman Act, but which does not satisfy the exemption requirements of the state-action doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943). Shell respectfully suggests that the Court of Appeals erred in uncritically applying the broad language in *Exxon* v. *Governor of Maryland*, 98 S.Ct. at 2217-18, to uphold a California statute regardless of the severity of the anticompetitive consequences it will create.

B. The California Statute

The operative section of Chapter 8 is Section 21200, which provides in part that it is unlawful for any seller, including interstate sellers, of motor vehicle fuels or oils engaged in business in California to discriminate in price between different purchasers where the effect of

such discrimination is to lessen competition, or to injure, destroy, or prevent competition, and:

> Upon proof being made, at any hearing on a complaint under this section, that there has been such discrimination in price, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section. Nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that *his lower price* to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor and *was also offered to any other of his purchasers in competition with the purchaser or purchasers receiving such lower price.* . . .

App. at 12a (emphasis supplied).

With the exception of the emphasized portions above, Section 21200 of Chapter 8 roughly follows the language of Section 2(b) of the Robinson-Patman Act. The critical difference is that unlike the Robinson-Patman Act, which permits a seller to limit the grant of a lower price to a customer who has received an equally lower price offer from the seller's competitor, Chapter 8 eliminates that procompetitive conduct entirely by *requiring* that the seller offer the same lower price to every other purchaser "in competition with the purchaser or purchasers receiving such lower price," *id.*, in which case there is no longer any second line discrimination. Thus, if a seller wishes to meet a competitor's offer of a lower price to any existing or potential customer, then the seller must also offer that same lower price to all other customers who, in any manner, compete with such existing or potential customers. This requirement is not restricted to any particular type of customer such as service station dealers who resell to the motoring public, but includes jobbers

or wholesalers, and commercial, agricultural and industrial customers which consume the motor fuel in the normal operation of their businesses. The California statute regulates pricing to every class of business entity in California's industrial society to which Shell sells gasoline and diesel fuel for any purpose.

C. Proceedings Below

Shell commenced this lawsuit on December 17, 1975, by filing a complaint against Evelle J. Younger, Attorney General of California, seeking a declaration that on its face Chapter 8 was in conflict with the Robinson-Patman Act and thus was void under the Supremacy Clause. The complaint alleged, *inter alia*, that Chapter 8 effectively destroyed price competition in the sale and distribution of motor fuel in California by destroying price flexibility. The jurisdiction of the District Court was founded on 28 U.S.C. § 1331 (1976).

On June 11, 1976, after extensive discovery by respondent, the District Court, per the Honorable Lloyd H. Burke, granted Shell's motion for summary judgment holding that "Chapter 8 of Division 8 frustrates the Congressional purpose embodied in Section 2(b) of the Robinson-Patman Act . . . to foster and encourage price competition." App. at 2a. Respondent Younger filed an appeal to the Ninth Circuit where the case was briefed, argued, and submitted for decision in June 1977. Subsequently, in October of 1977, this Court noted probable jurisdiction over the appeals of Shell and other oil companies in *Exxon* v. *Governor of Maryland.* In an Order entered December 27, 1977, the Court of Appeals vacated the submission of Younger's appeal pending a decision in *Exxon.* App. at 5a.

After this Court's decision in *Exxon,* the Court of Appeals granted Shell's motion for leave to file supplemental briefs. While not abandoning its contention that

the California statute was in conflict with the Robinson-Patman Act, Shell also urged in supplemental briefs that the anticompetitive effects of Chapter 8 brought the California statute into direct conflict with the Sherman Act. In a decision entered November 28, 1978, the Ninth Circuit rejected Shell's contentions and, relying solely on *Exxon,* held that the California statute could not conflict with Section 2(b) of the Robinson-Patman Act. The Court of Appeals further uncritically applied this Court's language in *Exxon,* 98 S.Ct. at 2218, and held that under *Exxon's* sweeping language the anticompetitive effects of Chapter 8 were not sufficient to void it. The Court of Appeals reasoned that even assuming that the anticompetitive effects of Chapter 8 are greater than those created by the Maryland statute in *Exxon,* "this difference in the degree of impact on competition does not support an inference of preemption where none was warranted in *Exxon.*" App. at 9a. The Court of Appeals relied on no other authority.

The Court of Appeals also rejected the California Supreme Court's reasoning in *Rice* v. *Alcoholic Beverage Control Appeals Board,* 21 Cal.3d 431, 579 P.2d 476, 146 Cal. Rptr. 585 (1978), which decision had applied the policies of the Sherman Act to strike down a similarly anticompetitive California statute.

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT ERRED IN READING *EXXON* AS WITHOUT LIMITATION.

The heart of this case is whether a state may regulate competition so as to create manifest anticompetitive results without regard to the policies and purposes of Congress as expressed in the Sherman Act. The question is whether the Supremacy Clause and the Sherman Act draw a logical and principled line across which a state may not go, except within the orbit of the state-action

doctrine of *Parker* v. *Brown.* As the decision of the Court of Appeals makes clear, no such line is apparent in current doctrine as expressed in *Exxon. Exxon* has created a vast wilderness of legal uncertainty by failing to provide an analytical framework for the lower courts to apply in judging the constitutionality of anticompetitive state legislation. This uncertainty must be resolved if California consumers are to be spared the anticompetitive effects of Chapter 8 and if the lower courts are to be expected to reach well-reasoned decisions in future cases which, in view of the proliferation of state statutes akin to Chapter 8,[1] will inevitably arise.

A. Chapter 8 Is Fundamentally Anticompetitive.

California's Chapter 8 is the result of an intentional decision of the California legislature to regulate competition in the interstate and intrastate sale and distribution of motor vehicle fuels in California. The stated purpose of the statute is that "[c]ompetition" requires the prohibition of "unreasonable discriminatory practices" so as to promote "the fair and efficient functioning of a free market economy." App. at 13a-14a. Chapter 8 is thus *not* a statute where the effects on competition are merely incidental to legislation designed to achieve some other regulatory purpose to promote the health or safety of its citizens. Chapter 8 goes straight to the heart of our economic system by directly regulating pricing conduct.

The effect of Chapter 8 is that price competition for the business of one purchaser is prohibited unless the seller is willing to bear the financial loss associated with granting the same lower price to all other competing customers. A seller is thus forced to make the "ruinous choice" between (1) *not* meeting the competition for a particular customer's business and consequently risking

[1] *See Exxon*, 98 S.Ct. at 2215 n.18.

the loss of that business, or (2) meeting the competitor's lower price, but sacrificing revenues by lowering his price to each competing customer.

California exacerbates this "ruinous choice" even further. Section 21200 of Chapter 8 goes on, in plain language, to require that before a seller has a defense he must prove that "his lower price to any purchaser or purchasers . . . was also offered to any other of his purchasers in competition with the purchaser or purchasers *receiving* such lower price." App. at 12a (emphasis supplied). Thus, to comply with the statute, the same price reduction must be granted not only to those customers immediately competing with the customer who received the lower price offer from the seller's competitor, but as well to all other, more removed customers who compete with the immediately competing customers. Because these more removed customers, in turn, may compete with still other further removed customers, a seller such as Shell would have to grant the same lower price to the next group of competing customers, and so on, and on. Chapter 8 thus creates a "ripple effect" of price reductions in a competitive continuum extending throughout the entirety of every populated area of California, in ever-expanding radii from the initial price activity. Moreover, because of the elaborate and modern highway system in California and particularly along the coastal megalopolis, and because Shell's customers are located and operate throughout, in rural as well as urban areas, Jameson Aff'd ¶ 2, the competitive continuum could easily ripple into every corner of the state, particularly from border to border along the coastal population band. In fact, the statute simply prohibits price discrimination between competing customers.[2]

[2] Except in those instances where different costs of manufacture, marketing, transportation, sale or delivery justify the discrimination.

The practical effect of Chapter 8 is twofold. First, sellers will no longer have an economic inducement to grant price reductions to keep existing customers or to gain new customers because no seller will engage in price competition for the business of one customer at the cost of a widespread price reduction to many customers. The record is uncontradicted that large industrial, agricultural and commercial bulk customers as a matter of course switch gasoline suppliers on a regular basis to obtain the lowest available price for the gasoline they purchase. The existing price competition for sales to these customers is intense. In the face of this competition, "to retain that customer's business and to avoid losing it to Shell's competitor who has offered a lower price," Jameson Aff'd ¶ 3, Shell will have to meet the lower price.

Chapter 8 is exactly the type of situation perceived by Mr. Justice Powell, concurring in *United States* v. *United States Gypsum Co.*, —— U.S. ——, 98 S.Ct. 2864, 2890 (1978), where he recognized that unless sellers are permitted to respond to individual competitive situations,

> sellers sometimes would face the unenviable choice of reducing prices to one buyer and risking Robinson-Patman Act liability, refusing to do so and losing the sale, or reducing prices to all buyers.
>
> A prudent businessman faced with this choice often would *forego the price reduction altogether.* This reaction *would disserve the procompetitive policy of the Sherman Act* without advancing materially the antidiscrimination policy of the Robinson-Patman Act. (Emphasis supplied).

Chapter 8's first anticompetitive effect thus is to stabilize motor fuel prices at artifically high levels by removing the basic economic incentive to engage in price competition.

The second anticompetitive effect is that Chapter 8 effectively mandates horizontal allocation of customers among sellers and raises significant barriers to entry at customer levels. For example, no supplier would grant a lower price to meet competition for a potential customer new to the business or for an existing customer of another supplier, because the supplier would then be forced to grant the same lower price to every one of his existing customers which happened to compete with the new customer.[3] Thus, no purchaser from *any* supplier could hope to use the competitive forces of the marketplace to obtain a price concession because a supplier would measure the cost of that concession, *not* in terms of revenues lost from that particular purchaser, but as well in terms of the cost of granting the same price concession to every other competing customer. Each supplier thus becomes locked into supplying solely his own customers, with no incentive to seek out other customers if price competition would be necessary to obtain their business. The California statute thus would mandate precisely the same allocation of customers that would result from an express agreement among suppliers.

The anticompetitive effects of the California statute will be far more comprehensive in scope than the effects created by the Maryland statute adjudicated in *Exxon.* The Maryland statute presented no possibility of the *de facto* customer allocation and barriers to customer entry wrought here because it did not address the situation where suppliers compete for sales to the same customers[4]—precisely the situation adjudicated in *Standard Oil Co.* v. *FTC*, 340 U.S. 231 (1951), where this Court

[3] In *Cadigan* v. *Texaco Inc.*, 492 F.2d 383, 387 (9th Cir. 1974), the Ninth Circuit held that a discriminatory price so as to meet competition for *new* customers is protected by Section 2(b) of the Robinson-Patman Act. *See also Sunshine Biscuits, Inc.* v. *FTC*, 306 F.2d 48, 52 (7th Cir. 1962).

[4] *Exxon*, 98 S.Ct. at 2215 n.19.

held that the procompetitive purposes of the Sherman Act required that Section 2(b) be construed to provide an *absolute* defense to any charge of price discrimination. *Id.* at 249-51. Moreover, the scope of the Maryland statute was restricted to temporary voluntary competitive allowances granted to retail service station dealers, while the California statute encompasses and effectively prohibits all price reductions, for extended as well as temporary duration, to all types and classes of gasoline resellers and commercial customers, not just service station dealers.[5]

B. Under the Supremacy Clause and Basic Principles of Federalism, the Sherman Act Must, at Some Point, Prevail Over Anticompetitive State Legislation.

Since 1787, the Supremacy Clause has been the keystone of American federalism through which the sovereign powers of the federal and state governments have been apportioned. James Madison, writing in The Federalist Papers, spoke of the Supremacy Clause as a fundamental principle of government, stating that, without it,

> . . . the world would have seen, for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have *seen the authority of the whole society everywhere subordinate to the authority of the part; it would have seen a monster, in which the head was under the direction of the members.* The Federalist, No. 44 (J. Madison) at 287 (New American Library ed. 1961) (emphasis supplied).

Since the seminal decision in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 432 (1819), this Court has evolved a multi-part analysis to be applied in all Supremacy Clause cases. First, a state law must fall where Congress has decided to "occupy the field" to the exclusion of any state regulation "even if [the exercise of state authority is] harmonious" with federal law. *De Canas* v. *Bica*, 424 U.S. 351, 359 n.7 (1976). That is not Shell's argument. On the other hand, where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941); *see also Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 165 (1978); *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525-26 (1977), or where "state legislation . . . frustrates the full effectiveness of federal law," *Perez* v. *Campbell*, 402 U.S. 637, 652 (1971), or if "the federal policy '[is] set at naught, or its benefits denied' by state law," *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225, 229 (1964), the state act is void. The state law cannot stand where it "*produce[s] a result inconsistent with the objectives of the federal statute.*" *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis supplied).

[5] The Maryland Court of Appeals construed the statutory term "voluntary allowances" to mean *temporary* price reductions in the wholesale price of gasoline to a retail dealer. 279 Md. 410, 447, 370 A.2d 1102 (1977).

In *Exxon*, this Court acknowledged that the Maryland statute would have an anticompetitive effect. The Court thus admitted that "[i]n this sense, there is a conflict between the statute and the central policy of the Sherman Act—our 'charter of economic liberty,' " 98 S.Ct. at 2218 (citation omitted), but continued:

> Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the Maryland statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed. *Id.*

Taken literally, as the Court of Appeals did, that broad language is susceptible to an interpretation that even the most severe anticompetitive effects of a state statute may never constitute the basis for a conflict with the Sherman Act under the Supremacy Clause.

This Court's earlier decision in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951), stands for the proposition that the Supremacy Clause is not a dead letter. There, this Court declared invalid a "non-signer" provision in Louisiana law. Mr. Justice Douglas, writing for this Court, unequivocally held that the Louisiana statute was invalid and unenforceable because it went beyond the bounds of the Miller-Tydings Act, 50 Stat. 693 (1937), *repealed*, 89 Stat. 801 (1075): "when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids," 341 U.S. at 389; to interpret the Miller-Tydings Act to permit such anticompetitive state legislation "*would have a vast and devastating effect on Sherman Act policies.*" *Id.* (emphasis supplied).

The conflict with "Sherman Act policies" mandated by California's Chapter 8 is, in principle, indistinguishable from the conflict with "Sherman Act policies" adjudicated in *Schwegmann.* As in *Schwegmann*, the California statute would stabilize prices and, by making it economically prohibitive to engage in price competition, would establish a price floor for motor fuels. Further, like the Louisiana statute, Chapter 8 results from a state legislature's decision to control and regulate competition *as such.*

C. The Court of Appeals Erred in Uncritically Failing to Construe the *Parker* v. *Brown* Doctrine as a Limitation on *Exxon.*

The nature of the limits on state legislatures in their efforts to directly regulate competition is illustrated by this Court's very recent decision in *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, —— U.S. ——, 47 U.S.L.W. 4017 (U.S. December 5, 1978), rendered after the decision by the Court of Appeals in this case. At issue in *New Motor* was the constitutionality of the California Automobile Franchise Act. The stated purpose of the Act was to protect existing franchisees from new franchisees

"where the effect of such intrabrand competition would be injurious to the existing franchisees and to the public interest," 47 U.S.L.W. at 4019—a direct regulation of competition *qua* competition.

The statute was challenged on the ground, *inter alia*, that it was in conflict with the Sherman Act and thus invalid under the principles of *Schwegman.* Holding that the California Act was not in conflict with the Sherman Act because it constituted a valid exercise of the state's power under the state-action doctrine of *Parker* v. *Brown*, the California statute was upheld:

> The dispositive answer is that the Act's regulatory scheme is a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships. The regulation is therefore outside the reach of the antitrust laws under the 'state action' exemption. *Parker* v. *Brown*, 317 U.S. 341 (1943); *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977). *See also City of Lafayette* v. *Louisiana Power & Light Co.*, ——U.S. —— (1978).

47 U.S.L.W. at 4021. This Court also stressed that the anticompetitive restraint created by the California Act was limited in nature and "[t]he duration of interim restraint *is subject to ongoing regulatory supervision.*" *Id.* (emphasis supplied).

The analysis of *New Motor* represents an appropriate limitation on the boundless language of *Exxon* where a state legislature is attempting to directly regulate competition *qua* competition. Indeed, it was precisely this approach which the California Supreme Court recently adopted in *Rice* v. *Alcoholic Beverage Control Appeals Board*, 21 Cal.3d 431, 579 P.2d 476, 146 Cal. Rptr. 585 (1978), discussed *infra.* Both *New Motor* and *Rice* proceed in their analyses upon the proposition that when

a state undertakes to directly regulate competition *as such*, it must respect the procompetitive policies of the Sherman Act *unless* the state is prepared to enact a "clearly articulated and affirmatively expressed" system of regulation which fully satisfies the requirements of the state-action doctrine.

Such a rule would have many benefits. First, utilization of the *Parker* v. *Brown* doctrine would create a conceptual "bright line" which the lower courts could apply in a reasoned and consistent fashion. Under the broad and sweeping language of *Exxon*, this is not possible.

Second, and more importantly, the use of the state-action doctrine as the governing standard would fully preserve the objectives of the Sherman Act, as well as the principles underlying the Supremacy Clause, while at the same time protecting the right of the state to engage in economic regulation. As expressed last term in *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978), the state-action doctrine constitutes an "implied exclusion" from the Sherman Act in that the Congress did not intend the antitrust laws to encompass a state's anticompetitive conduct. 435 U.S. at 398-99. Unless the state's regulatory scheme satisfies the requirements of the *Parker* doctrine, it should not be permitted to interfere with the "regime of competition" which the Sherman Act established "as the fundamental principle governing commerce in this country." *Lafayette*, 435 U.S. at 398.

California's Chapter 8 does not satisfy the requirements of the *Parker* doctrine. One of the most important requirements is that the anticompetitive effects of the state statute be "subject to ongoing regulatory supervision." *New Motor*, 47 U.S.L.W. at 4021. The anticompetitive effects of Chapter 8 are not in any manner so controlled. Furthermore, enforcement of Chapter 8

would neither further nor even be consistent with any other federal legislative purpose. *See Parker* v. *Brown*, 317 U.S. at 352-59. As this Court noted in *Lafayette*, "[t]he State regulatory program involved in *Parker* furthered an important state interest which was consistent with federal policy." *Lafayette*, 435 U.S. at 409 n.39. As perceived by Mr. Justice Powell, concurring in *Gypsum*, the imposition of the ruinous choice required by the California statute "would disserve the procompetitive policy of the Sherman Act without advancing materially the antidiscrimination policy of the Robinson-Patman Act." *United States Gypsum Co.*, 98 S.Ct. at 2890.

D. The Court of Appeals Failed to Adhere to California Law and Policy and Strike Down Chapter 8 in Acance with the *Rice* Case.

The governmentally-imposed price uniformity that would result from enforcement of Chapter 8 is no different in its effects from a state-sanctioned and mandated price-fixing scheme. As such, California's Chapter 8, under the unequivocal state law and policy set forth by the California Supreme Court in *Rice* v. *Alcoholic Beverage Control Appeals Board*, 21 Cal.3d 431, 579 P.2d 476, 146 Cal. Rptr. 585 (1978),[6] deprives California citizens of the benefits of price competition and contravenes the fundamental purposes of the Sherman Act.

The California Supreme Court's unanimous decision in *Rice* struck down Section 24755 of the California Business and Professions Code which required manufacturers of alcoholic beverages to file minimum price schedules for distilled spirits and prohibited retail licensees from selling liquor at less than the prescribed prices, notwithstanding

[6] The *Rice* decision was not handed down until May 30, 1978, almost a year after oral argument was had before the Court of Appeals.

the provisions of the Twenty-First Amendment which expressly authorize the states to regulate trade in alcoholic beverages. The court held that such uniform price restrictions conflict with the California public interest in free competition and with the policies of the Sherman Act.

In *Rice* and under Chapter 8, price uniformity pursuant to a legislatively-commanded state policy is directed by state statute. In both, the California statute effectively "compels private persons to engage in anti-competitive conduct." 21 Cal.3d at 444, 579 P.2d at 485, 146 Cal. Rptr. at 594. In both, adherence to the California statute impacts through the reseller chain on direct sales to consumers of products for which prices are fixed in accordance with state policy. The anticompetitive effects flowing from California's Chapter 8 are congruent with the anticompetitive effects condemned in *Rice*.

Justice Stanley Mosk, speaking for a unanimous Supreme Court of California, in order to further the California public interest in free competition, set forth and adopted as the law of California "the policy underlying the Sherman Act":

> That policy was cogently described by Justice Black in *Northern Pacific Railway Co.* v. *United States* (1958) 356 U.S. 1, 4-5, 78 S.Ct. 514, 517, 2 L.Ed.2d 545: 'The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. . . .'

21 Cal.3d at 453, 579 P.2d at 491, 146 Cal. Rptr. at 600.

Once presented with the decision of the California Supreme Court in the *Rice* case which had analyzed and struck down a comparable anticompetitive California statute, application of the rule in *Rice* became obligatory for the Court of Appeals. *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938); *Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 461 (1967); *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580, 591 (1973); *Tarr* v. *Manchester Insurance Corp.*, 544 F.2d 14, 15 (1st Cir. 1976); *Calvin* v. *Rupp*, 471 F.2d 1346, 1349 n.2 (8th Cir. 1973); *Maternally Yours* v. *Your Maternity Shop, Inc.*, 234 F.2d 538, 540 n.1 (2d Cir. 1956). The Court of Appeals erred in failing to adhere to the California Supreme Court's rule laid down in *Rice* and in not striking down Chapter 8.

E. The Court of Appeals Erred in Uncritically Failing to Inquire Into the Degree of Antagonism Between the Sherman Act and Chapter 8.

If application of the *Parker* doctrine is not appropriate, there is a second principle that should limit the reach of the expansive language in the *Exxon* decision. As Mr. Justice Hughes stated in *Savage* v. *Jones*, 225 U.S. 501, 533 (1912), and as this Court has consistently proceeded in its analysis ever since, *see, e.g., Ray* v. *Atlantic Richfield Co., supra*, 435 U.S. at 157-58, the Supremacy Clause requires a careful analysis and consideration of the purposes intended by the federal statute, together with the practical effects of the challenged state statute. The inquiry is necessary to determine the severity of the antagonism between the two statutes and the necessity for removing the obstacle that interferes with the accomplishment of the overriding federal objectives. Application of this principle was evident in *Exxon* and was quite clearly developed in the recent *New Motor* decision. Nevertheless, in its *per curiam* opinion, the Court of Appeals uncritically rejected any such inquiry

and relied solely upon the broad language of *Exxon* for its authority. Indeed, the Court of Appeals stated that a "difference in the degree of impact on competition does not support an inference of preemption where none was warranted in *Exxon*." App. at 9a. Chapter 8 is a much more egregiously anticompetitive statute than the Maryland Act. This departure from traditional Supremacy Clause analysis was erroneous.

F. The Court of Appeals Erred in Uncritically Applying the Language of *Exxon* Because the California Statute Encompasses Price Competition for Sales to the Same Customer, Thereby Undermining the Policies of Section 2(b) of the Robinson-Patman Act.

In the decision in *Exxon*, this Court specifically left open the fact situation where "a discriminatory price reduction [is] made to meet an equally low price offered to the *same* buyer by a competing seller. In the lower court's view, this situation clearly fell within the § 2(b) defenses, but was not encompassed by the term 'voluntary allowances.'" 98 S.Ct. at 2215 n.19 (citation omitted). California's Chapter 8 squarely presents this fact situation that was left open in the Maryland litigation.

This Court's earlier decision in *Standard Oil Co.* v. *FTC*, 340 U.S. 231 (1951), directly adjudicated this type of competitive situation. There, Standard had seven customers in the Detroit area who purchased and resold both as jobbers and as retailers. Standard lost three of these customers to competitors because it refused to meet the lower prices the competing suppliers made to them. Thereafter, Standard lowered its price to the four remaining customers in differing amounts to meet in good faith, either in whole or in part, the lower price offers from the competing suppliers. This Court held in *Standard Oil* and its progeny, *FTC* v. *Standard Oil Co.*, 355 U.S. 396, 402-04 (1958), that under Section 2(b) of the Robinson-Patman Act Standard was entitled to defend itself competitively and meet its competition on an individualized customer-by-customer basis, regardless of the competitive impact. 340 U.S. at 250-51; *see also FTC* v. *Sun Oil Co.*, 371 U.S. 505, 514 (1963). California's Chapter 8 obliterates that individualized defense. In the process, it also brings the certainty of price rigidity and the nullification of competition in gasoline marketing to California consumers. This state statute attempts to directly regulate the situation adjudicated in *Standard Oil*; it must fall pursuant to the dictates of the Supremacy Clause.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Harry E. Jennings, Jr.
Mark W. Pennak
Steven Sarfatti

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Of Counsel

Dated: January 15, 1979

APPENDIX

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THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

C-75 2691 LHB

SHELL OIL COMPANY,
Plaintiff,

vs.

EVELLE J. YOUNGER,
Attorney General of the State of California,
Defendant.

[Filed June 11, 1976]

ORDER

This cause came on to be heard by this Court upon:

1. Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction Because of a Lack of a Justiciable Controversy and the Non-Joinder of Interested Parties, and Motion to Dismiss or in the Alternative Stay This Action on Abstention Grounds;

2. Defendant's Notice of Three-Judge District Court Requirement; and

3. Plaintiff Shell Oil Company's Motion for Summary Judgment.

Having considered the affidavits and memoranda of points and authorities submitted in support of and in opposition to these three motions, having considered the pleadings and other papers on file, having heard the oral

argument of counsel, and being fully advised herein, the Court hereby finds and decrees that:

1. Defendant's motion to dismiss, or to stay, is denied in all respects. This action presents a justiciable controversy. None of the other grounds urged by defendant in support of the motion to dismiss or to stay is valid.

2. This Court possesses the jurisdiction to deny defendant's motion to dismiss, or stay, and to decide Shell's motion for summary judgment, and the convening of a three-judge court is not required. The Court declares, and the parties have agreed in open court, that Section 2281 of the Judicial Code, 28 U.S.C. § 2281, is inapplicable to the resolution of constitutional questions arising solely under the Supremacy Clause of the United States Constitution and Shell's motion for summary judgment arises solely under the Supremacy Clause.

3. Chapter 8, Division 8 of the California Business and Professions Code (California Assembly Bill No. 950, enacted by the California Legislature in its 1975 session, signed into law on September 22, 1975 and effective January 1, 1976) is in irreconcilable conflict with the Federal Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), et seq. and under the Supremacy Clause of the United States Constitution must be, and hereby is, declared to be unconstitutional, illegal, invalid and of no force and effect. Chapter 8 of Division 8 frustrates the Congressional purpose embodied in Section 2(b) of the Robinson-Patman Act, 15 U.S.C. § 13(b), to foster and encourage price competition. Moreover, the California statute is in direct, actual conflict with the Federal Act.

There is no genuine issue of material fact relative to Shell's motion for summary judgment and plaintiff Shell is entitled to judgment as a matter of law.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction Because of a Lack of Justiciable Controversy and the Non-Joinder of Interested Parties, and Motion to Dismiss or in the Alternative Stay This Action on Abstention Grounds is denied in all respects.

2. This Court possesses the jurisdiction to deny defendant's motion to dismiss, or to stay, and to decide Shell's summary judgment motion. The convening of a three-judge court is not necessary. Section 2281 of the Judicial Code, 28 U.S.C. § 2281, is inapplicable since Shell's motion for summary judgment involves solely a claim of unconstitutionality under the Supremacy Clause of the United States Constitution.

3. Plaintiff Shell Oil Company's Motion for Summary Judgment is hereby granted on the grounds that Chapter 8, Division 8 of the California Business and Professions Code (Assembly Bill 950) is in direct, actual irreconcilable conflict with the Federal Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), et seq.

4. Plaintiff's motion in open Court to dismiss the second count of its Complaint (¶¶ 14-17), without prejudice, is hereby granted.

5. Judgment be and the same hereby is entered in favor of plaintiff Shell Oil Company and against the defendant Evelle J. Younger, Attorney General of the State of California, and Chapter 8, Division 8 of the California Business and Professions Code (Assembly Bill 950) is hereby declared and decreed to be unconstitutional, illegal, invalid and of no force and effect.

6. Evelle J. Younger, Attorney General of the State of California, and each of his successors, is hereby prohibited and enjoined from enforcing in any way against

plaintiff Shell Oil Company the provisions of Chapter 8, Division 8 of the California Business and Professions Code (Assembly Bill 950).

7. Costs to be taxed by the Clerk in favor of plaintiff and against defendant.

Dated: June 11, 1976.

/s/ Lloyd H. Burke
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-2784

SHELL OIL COMPANY,
Plaintiff-Appellee,
v.

EVELLE J. YOUNGER, Attorney General of the State of California,
Defendant-Appellant.

ORDER

[Filed December 27, 1977]

Before: BROWNING, * TUTTLE, and ANDERSON, Circuit Judges

Submission of the appeal is vacated pending a decision by the Supreme Court of the United States in *Exxon Corp.* v. *Maryland, review granted* 46 U.S.L.W. 3184 (October 3, 1977).

* Honorable Elbert Parr Tuttle, Senior United States Circuit Judge, Fifth Circuit, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-2784

[Received December 4, 1978]

SHELL OIL COMPANY,
Plaintiff-Appellee,
v.

EVELLE J. YOUNGER, Attorney General of the State of California,
Defendant-Appellant.

[Filed November 28, 1978]

Appeal from the United States District Court for the Northern District of California

OPINION

Before: BROWNING, TUTTLE *, and ANDERSON, Circuit Judges

PER CURIAM:

In 1975 the California legislature passed section 21200 of the California Business & Professions Code (chapter 8) to regulate price discrimination by major distributors of motor fuel. The first paragraph of chapter 8, in language paralleling section 2a of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1970), prohibits price discrimination where the effect of such discrimination is to lessen competition. The second paragraph of chapter 8, like section 2b of the federal statute, 15 U.S.C. § 13(b), provides a "meeting competition" defense. The defense under the California statute, however, is narrower than that under the federal statute. To be exculpated under the state act, a discriminating seller must prove not only that the lower price was offered in good faith to meet the equally low price of a competitor, which is all the federal statute requires, but also that the lower price was offered to all customers of the seller in competition with the favored purchaser.

* Honorable Elbert Parr Tuttle, Senior Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

Appellee brought this action for declaratory and injunctive relief contending that, because of the limited "meeting competition" defense, the state act is in conflict with section 2b of the Robinson-Patman Act and therefore unconstitutional under the Supremacy Clause. The district court agreed, and granted summary judgment declaring the state statute void and of no effect. This appeal followed.

Appellee originally argued broadly that the California statute is in conflict with the Robinson-Patman Act (1) because the California statute requires a seller to grant a lower price to customers other than the one who received a lower price from a competitor of the seller, and thus compels the seller to violate the Robinson-Patman Act which protects discriminatory price reductions only to the customer who has received a price offer from the competing seller; and (2) because the California statute deprives the seller of a federally guaranteed right to defend against customer raids by a price reduction limited to the particular customer to whom the competitor has offered a lower price.

The Supreme Court rejected the premise of both of these arguments in *Exxon Corp. v. Governor of Maryland*, —— U.S. —— (June 14, 1978). The Court said:

> Appellants, however, also claim that the Robinson-Patman Act does not simply permit localized discrimination, but actually establishes a federal right to engage in discriminatory pricing in certain situations.

They argue that this federal right may be found directly in § 2(b), or, more generally, in our Nation's basic policy favoring competition as reflected in the Sherman Act as well as § 2(b). We find neither argument persuasive.

The proviso in § 2(b) of the Robinson-Patman Act is merely an exception to that statute's broad prohibition against discriminatory pricing. It created no new federal right; quite the contrary, it defined a specific, limited defense, and even narrowed the good-faith defense that had previously existed. To be sure, the defense is an important one, and the interpretation of its contours has been informed by the underlying national policy favoring competition which it reflects. But it is illogical to infer that by excluding certain competitive behavior from the general ban against discriminatory pricing, Congress intended to pre-empt the States' power to prohibit any conduct within that exclusion. This Court is generally reluctant to infer pre-emption, *see, e.g., DeCanas v. Bica*, 424 U.S. 351, 357-358, n.5; *Merrill Lynch, Pierce Fenner & Smith v. Ware*, 414 U.S. 117, 127, and it would be particularly inappropriate to do so in this case because the basic purposes of the state statute and the Robinson-Patman Act are similar. Both reflect a policy choice favoring the interest in equal treatment of all customers over the interest in allowing sellers freedom to make selective competitive decisions.

Id.; Slip op. at 13-14 (footnotes omitted).

Attempting to escape the force of *Exxon*, appellees now argue that the anticompetitive effects of chapter 8 conflict with the Sherman Act policy favoring price competition. *Exxon* disposes of this argument as well:

Appellants . . . [state] that the Maryland statute [challenged in *Exxon*] will have an anticompetitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act—our "charter of economic liberty." *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 4. Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the Maryland statute. For if an adverse effect on competition were, in and of itself, enough to render a State statute invalid, the States' power to engage in economic regulation would be effectively destroyed. We are, therefore, satisfied that neither the broad implications of the Sherman Act nor the Robinson-Patman Act can fairly be construed as a congressional decision to pre-empt the power of the Maryland Legislature to enact this law.

Id. at 14-15 (footnote omitted).

Appellees suggest that *Exxon* is distinguishable because the anticompetitive effects of chapter 8 are more severe—and thus more in conflict with the federal policy of price competition—than the effects of the Maryland statute upheld in *Exxon*.[1] Assuming appellees correctly analyze the potential effect of chapter 8, this difference in the degree of impact on competition does not support an inference of preemption where none was warranted in *Exxon*.

The decision of the California Supreme Court in *Rica* [sic] *v. Alcoholic Beverage Control Appeals Board*, 146 Cal. Rptr. 585, 579 P.2d 476 (1978), is hardly "disposi-

[1] Four differences are cited: that chapter 8 extends to permanent price reductions, while the Maryland statute applied only to temporary ones; that chapter 8, unlike the Maryland law, covers price concessions on bulk and wholesale fuel sales as well as sales to retail service stations; that chapter 8 applies to gasoline flowing in interstate as well as intrastate commerce; and that chapter 8 limits the duration of "meeting competition" price reductions to one year.

tive of the issue on this appeal," as appellees contend. As a statement of state law it is inapplicable here. As an exposition of federal law it cannot supplant *Exxon*.

Reversed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-2784

DC CV 75-2691

LFB

SHELL OIL COMPANY,
Plaintiff/Appellee,
vs.

EVELLE J. YOUNGER,
Attorney General of the State of California,
Defendant/Appellant.

[Filed December 20, 1978]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of William Simon, Esq. counsel for the Plaintiff/Appellee, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41(a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Plaintiff/Appellee herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before January 15, 1979.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

/s/ James R. Browning
United States Circuit Judge.
HON. JAMES R. BROWNING

DATED: SAN FRANCISCO, CALIF.

The California Statute: Assembly Bill 950, Chapter 8, Division 8, California Business and Professions Code:

SECTION 1. Chapter 8 (commencing with Section 21200) is added to Division 8 of the Business and Professions Code, to read:

CHAPTER 8. UNFAIR PRACTICES

21200. It is unlawful for any refiner, distributor, manufacturer, or transporter of motor vehicle fuels or oils engaged in business in this state, either directly or indirectly, to discriminate in price between different purchasers of motor vehicle fuels or oils of like grade and quality, where the effect of such discrimination is to lessen competition, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

Upon proof being made, at any hearing on a complaint under this section, that there has been such discrimination in price, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section. Nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor and was also offered to any other of his purchasers in competition with the purchaser or purchasers receiving such lower price. If such lower price should be incorporated into a term contract, no such contract shall as to such discriminatory price be valid for more than one year.

Nothing in this section shall prevent differentials which make only due allowance for differences in the cost of manufacture, marketing, transportation, sale, or delivery

resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered.

Nothing in this section shall prevent persons engaged in selling motor vehicle fuels or oils in this state from selecting their own customers in bona fide transactions and not in restraint of trade.

Nothing in this section shall prevent price changes from time to time where in response to changing conditions affecting the market for, or the marketability of, the products concerned, such as, but not limited to, actual or imminent deterioration of products, distress sales under court process, or sales in good faith in discontinuance of business in the products concerned.

Nothing in this section shall apply to the purchase of motor vehicle fuels or oils for their own use by state and local agencies or public utilities.

21201. The provisions of this chapter shall only apply to refiners, distributors, manufacturers, or transporters of petroleum products engaged in business in this state whose total production, gasoline refining capacity or sales volume at the wholesale level is 50,000 barrels a day or more.

21202. Any person injured by any violation of the provisions of this chapter may bring an action for the recovery of damages. Judgment may be entered for three times the amount at which the actual damages are assessed plus reasonable attorney's fees.

21203. The Legislature finds and declares that distribution and sales of motor vehicle fuels and oils in the State of California affect the general economy of the state, the public interest and the public welfare. Competition and freedom from unreasonable discriminatory practices are essential to the fair and efficient function-

ing of a free market economy. Competitive conditions are rapidly changing with resulting market dislocation. Therefore, it is further provided that any existing contracts, arrangements, or agreements with provision for prices not in compliance with this chapter shall be void on and after the effective date of this chapter as to such provisions, except for any as may be required to be extended beyond said date to comply with any applicable federal price control laws, regulations or orders.

Sherman Act, 15 U.S.C. §§ 1, 2, 3 (1976):

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hun-

dred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708.

§ 3. Trusts in Territories or District of Columbia illegal; combination a felony

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708.

Section 2, Clayton Act, as amended by Section 2 of the Robinson-Patman Act, 15 U.S.C. § 13 (1976):

§ 13. Discrimination in price, services, or facilities.

(a) Price; selection of customers

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different

purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent

deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Burden of Rebutting Prima-Facie Case of Discrimination

Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) Payment or Acceptance of Commission, Brokerage or Other Compensation

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) Payment for Services or Facilities for Processing or Sale

It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) Furnishing Services or Facilities for Processing, Handling, etc.

It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) Knowingly Inducing or Receiving Discriminatory Price

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1116

SHELL OIL COMPANY,
Petitioner,
v.
GEORGE DEUKMEJIAN, Attorney General of the State of California
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Respondent's Brief in Opposition

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In the Supreme Court of the United States

October Term, 1978

No. 78-1116

Shell Oil Company,
Petitioner,
v.
George Deukmejian, Attorney General of the State of California
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Respondent's Brief in Opposition

The judgment of the court below upholding the constitutionality of a California statute prohibiting price discrimination in the sale of motor vehicle fuels and oils correctly follows this Court's recent decision in *Exxon v. Maryland,* 437 U.S. 117 (1978), *reh. den. sub nom. Shell Oil Co. v. Maryland,* .... U.S. ...., 99 S.Ct. 232 (1978). Shell's petition is a thinly-veiled and pertinacious effort to relitigate this Court's *Exxon* decision. The arguments Shell now seeks to raise, furthermore, were never raised in the District Court and are based upon hypothetical situations that may

never come to pass and upon Shell's unfounded characterization of the California statute as a "price-fixing scheme".

STATEMENT OF THE CASE

A. The California Statute.

In 1975, the California Legislature adopted Chapter 8 of Division 8 of the Business and Professions Code, which prohibits price discrimination in the sale of "motor vehicle fuels and oils" (*e.g.*, gasoline) by petroleum companies where the discrimination lessens competition.[1] (Cal. Bus. & Prof. Code § 21200-3.)

Essentially, Chapter 8 prohibits major gasoline wholesalers (defined as a company whose gasoline refining capacity or wholesale sales volume is 50,000 barrels a day or more) from discriminating in the *wholesale* gasoline price charged where the effect of the discrimination is to lessen or injure competition (Cal. Bus. & Prof. Code § 21200).[2] The language used is virtually identical to section 2(a) of the Federal Robinson-Patman Act (15 U.S.C. § 13(a)), although that Act applies to interstate sales whereas Chapter 8 applies to wholesale gasoline sellers in California only.

1. Chapter 8 was introduced into the California Assembly on February 26, 1975 as AB 950, was reported out of the California Senate Committee on Business and Professions on August 26, 1975, *without opposition*, was promptly passed by the Legislature and signed into law by the Governor on September 22, 1975, to be effective on January 1, 1976. *See California Legislative Assembly Final History, 1975-76 Session* (1977) at 587.

2. The statute contains a legislative declaration that the distribution of motor gasoline in the State affects the general economy of the State, the public interest and the public welfare. The Legislature further declared that "[c]ompetition and freedom from unreasonable discriminatory practices are essential to the fair and efficient functioning of a free market economy." (Cal. Bus. & Prof. Code § 21203.)

The only material difference between the Robinson-Patman Act and Chapter 8 is contained in the so-called "meeting competition defense," a mechanism allowing justification for otherwise prohibited price discrimination. Section 2(b) of the Robinson-Patman Act if read literally allows a seller to justify discrimination by showing that his lower price was made in good faith to meet an equally low price of a competitor, the so-called "spot" pricing interpretation. In literal contrast, Chapter 8 allows a justification for price discrimination by showing that a seller's lower price was made in good faith to meet an equally low price of a competitor ". . . and was also offered to any other of his purchasers in competition with" the favored purchaser. (Cal. Bus. & Prof. Code § 21200.) Thus, under Chapter 8, a major gasoline supplier may only discriminate in pricing to meet competition in good faith, and then only on a competitive area basis.

B. The Proceedings Below.

Shell Oil Company, one of the ten or so companies in California whose gasoline marketing practices were the subject of the Legislature's concern and therefore subject to the Act, filed a complaint on December 17, 1975 attacking the constitutionality of the California statute. Although several grounds were raised in the complaint, the only ground on which Shell moved for summary judgment in the District Court was its claim that the California statute is preempted under the Supremacy Clause by the Robinson-Patman Act (15 U.S.C. § 13).[3]

3. Other challenges alleged in the complaint included Due Process and Contract Clause violations (R. 9-10); other challenges advanced in briefs by Shell and certain *amici curiae* include Equal Protection and Commerce Clause violations (R. 421, 513-4, 583, 629-30).

On June 11, 1976 the District Court held the California statute preempted by the Robinson-Patman Act, a decision which was reversed on appeal to the Ninth Circuit Court of Appeals after this Court's decision in *Exxon v. Maryland,* 437 U.S. 117 (1978), *reh. den. sub nom. Shell Oil Co. v. Maryland,* .... U.S. ...., 99 S.Ct. 232 (1978). *Shell Oil Co. v. Younger,* 587 F.2d 34 (9th Cir. 1978).

Shell did *not* argue in the District Court that the California statute is preempted by the Sherman Act (15 U.S.C. § 1, *et seq.*)[4] Shell waived all other challenges aside from preemption by the Robinson-Patman Act.[5] *See* Shell Cert. Pet. at (App.) 3a; R. 20, 30, 35, 39-76. On appeal to the Ninth Circuit Court of Appeals, Shell only argued preemption by the Robinson-Patman Act in its appellate brief. *For the first time in the three year pendency of its suit,* Shell argued in a supplemental brief after the Supreme Court's decision in *Exxon v. Maryland, supra,* that the Sherman Act preempts the California statute. The Ninth Circuit Court of Appeals rejected the contention and Shell now seeks certiorari primarily on this ground.

REASONS FOR DENYING THE WRIT

SHELL'S PETITION RAISES NO IMPORTANT LEGAL QUESTIONS

Just six months ago this Court in *Exxon v. Maryland,* 437 U.S. 117 (1978), *reh. den. sub nom. Shell Oil Co. v. Maryland,* .... U.S. ...., 99 S.Ct. 232 (1978), unanimously laid down the guiding principles that determine whether the Robinson-Patman Act or the general policy of the Sherman Act preempt a state price discrimination statute containing a more restrictive "meeting competition" defense than that contained in the Robinson-Patman Act. In establishing these principles, this Court refused to consider a variety of hypothetical situations raised by Shell and other oil companies. *Id.* at 130-1.

Shell's petition seeks to relitigate *Exxon v. Maryland, supra,* and seeks to raise several hypothetical situations that may never actually come to pass. Futhermore, under the guise of "protecting" the interests of the California consumer, Shell improperly seeks to supplant the judgment of the California Legislature with Shell's grossly exaggerated claims (without support in the record) that the California statute is "anticompetitive", causes "price rigidity" and "nullifies competition", and with Shell's totally unfounded claims that the statute constitutes a "price-fixing scheme" and a "*de facto* customer allocation" scheme in violation of the Sherman Act. (Shell Pet. at 1, 8, 11, 17, 21.) In short, Shell's petition raises no important legal questions and therefore should be denied.

4. Indeed, the portion of Shell's complaint alleging a Supremacy Clause violation (Count I) merely refers to preemption by the Robinson-Patman Act, not the Sherman Act.

5. Shell apparently did this to convert into a final judgment, the (otherwise interlocutory) District Court's order granting summary judgment on the claim that the California statute is preempted by the Robinson-Patman Act.

A. The Court of Appeals Correctly Rejected Shell's Claims That the California Price Discrimination Statute Is Preempted by the Robinson-Patman Act and the General Policy of the Sherman Act.

The Court of Appeals correctly rejected Shell's preemption claims under the principles stated in this Court's decision in *Exxon v. Maryland, supra,* 437 U.S. at 129-134. *See Shell Oil Co. v. Younger,* 487 F.2d 34 (9th Cir. 1978), reproduced at 6a-10a of Shell's petition.

Shell now contends that the *Exxon* decision left open the question whether the Robinson-Patman Act preempts the California statute as applied to a situation "where there is

price competition for sales to the *same purchaser*."[6] (Shell Pet. at 2, 20-21.) Even if the question were in fact left open by *Exxon*, the principles stated in *Exxon v. Maryland, supra*, compel rejection of the claim.

> ". . . [I]t is illogical to infer that by excluding certain competitive behavior from the general ban against discriminatory pricing, Congress intended to pre-empt the States' power to prohibit any conduct within that exclusion. This Court is generally reluctant to infer pre-emption, see, *e.g., DeCanas v. Bica*, 424 U.S. 351, 357-8, n. 5; *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127, and it would be particularly inappropriate to do so in this case because the basic purposes of the state statute and the Robinson-Patman Act are similar. Both reflect a policy of choice favoring the interest in equal treatment of all customers over the interest in allowing sellers freedom to make selective competitive decisions." 437 U.S. at 132-3 (footnote omitted.)

6. The existence of price competition for sales to the same purchaser is purely hypothetical as to Shell's branded dealer sales since branded dealers are prevented from switching suppliers by contract, by the California non-adulteration and passing-off law (Cal. Bus. & Prof. Code §§ 20911, 20930), and by the "several thousand dollar" cost of changing signs (R. 333-5, 861 at Appendix II, ¶s 4-6, 913-959). *See also* the discussion of Shell's extensive control of its dealers in *Shell Oil Co. v. FTC*, 360 F.2d 470, 479-487 (5th Cir. 1966).

Shell's claims of price competition for sales to the same customer seem to be based on its sales to industrial or commercial customers who are "end users" rather than resellers of gasoline. Whether the California statute applies to such accounts is unclear since the Legislature may have addressed a problem involving retail service stations and the statute has yet to be construed by the California courts. Federal courts should abstain from deciding such constitutional claims. *See e.g., Railroad Commission v. Pullman*, 312 U.S. 496 (1941); *Alabama Fed. of Labor v. McAdory*, 325 U.S. 450, 460-3, 470-1 (1945); *Reetz v. Bozanich*, 397 U.S. 82 (1970). Furthermore, Shell's claim that price competition for sales to commercial customers may be affected by the California statute is tenuous. The California statute is violated where a price discrimination between competing customers lessens competition between those customers. That a difference in gasoline prices to industrial customers, *e.g.*, lessens competition in the sale of the industrial product is dubious.

Furthermore, Shell's argument is based upon the premise that section 2(b) of the Robinson-Patman Act creates a "federal right to engage in discriminatory pricing", a premise that this Court specifically rejected in *Exxon v. Maryland, supra*, 437 U.S. at 131-2.

Thus the Court of Appeals correctly rejected Shell's pre-emption claims.

B. Shell Improperly Seeks to Raise Hypothetical Situations.

Shell's petition is based upon the hypothetical "ruinous choice" and "ripple effect" arguments (Shell Pet. at 8-11). Shell hypothesizes that a seller must either risk losing the business of a customer or keep the customer at the "ruinous" cost of a "widespread price reduction to many customers." (Shell Pet. at 10.) Shell's hypothesis that a ruinous, widespread price reduction to many customers is necessary is pure speculation.[7] Shell compounds its specu-

7. Since Shell, like other oil companies, have previously had a practice of meeting competition on a "trade area" basis, it is clear that Shell can meet competition under the California statute without a "ruinous" effect by extending the lower price to those customers competing with the customer to receive the favored price. Introduced as evidence in this case (under seal pursuant to a protective order) are several Shell "trade area" maps including that for the San Francisco market, which is divided into a number of trade areas containing those Shell customers who "normally compete with one another." *See* R. 861 (Document 42), at Appendix III. Shell's "trade area" practice is also documented in the affidavits of L.E. Yeager filed in May 1971 and April 1972 in *Bunty v. Shell Oil Co.*, 1972 Trade Cases ¶ 74,252 (D. Nev. 1972) [R. 298] and the letter of A.M. Minotti, counsel for Shell, dated August 13, 1970, contained in the Appendix to the Hearings on Marketing Practices in the Gasoline Industry, Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 91st Cong., 2d Sess., pt. 1 (1970), at pp. 196-7 [R. 262, 298]. (*See also*, R. 260-3, 298, 326-330, 333-5, 340, 342-8, 351-62.)

lation by the hypothetical argument that the price reduction "could easily ripple into every corner of the state . . . ." (Shell Pet. at 9). This, too, is pure speculation.[8]

Shell's attempt to raise hypothetical situations is an improper attempt to "seek . . . out conflicts . . . where none clearly exists." *Exxon v. Maryland, supra,* 437 U.S. at 130 (citations omitted).

C. Shell May Not Argue Preemption by the Sherman Act in This Court as It Never Raised the Point in the District Court.

Shell's argument that the California statute is preempted by the general policy of the Sherman Act was not raised in the District Court. See page 4, *supra.* Therefore, Shell cannot now raise this point. *See Tyrrell v. District of Columbia,* 243 U.S. 1, 5-6 (1917).

D. The Court of Appeals Correctly Rejected Shell's Claim That the California Statute Is Preempted by the General Policy of the Sherman Act.

Shell's claim that the California statute is preempted by the general policy of the Sherman Act is based on its incorrect use of hypothetical situations (see pages 7-8, *supra*) and upon its incorrect assertion that the California statute is anticompetitive and constitutes a "price fixing scheme" and a "*de facto* customer allocation" scheme. The California statute is not anticompetitive[9] and in no way compels

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8. Shells "ripple" argument was rejected by this Court in *FTC v. Sun Oil Co.,* 371 U.S. 505, 526-8 (1963).

9. Although Shell introduced *no* evidence in the District Court to show the anticompetitive effect of the California statute, California presented evidence of the anticompetitive effect of the meeting of competition on a "spot" basis and the pro-competitive effect of the meeting of competition on a "competitive area" basis under

or authorizes Shell to combine or conspire with others to fix prices or to divide or allocate customers.[10] Thus, the California statute in no way compels or directs a Sherman Act violation. Indeed, Shell so recognizes and merely claims that the California statute conflicts with the "general policy" of the Sherman Act.

Even if the California statute were assumed to be anticompetitive, this Court's decision in *Exxon v. Maryland, supra,* establishes that the California statute is not preempted by the Sherman Act. The California statute is clearly no more anticompetitive than the Maryland statute which this Court upheld as not preempted by the general policy of the Sherman Act. The Maryland statute requires voluntary allowances to be granted uniformly throughout the whole state whereas the California statute merely requires the meeting of competition on a competitive area basis, which is considerably smaller than statewide. Thus

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the California statute (R. 861 at Appendix II at ¶s 8-15). Furthermore, the anticompetitive effect of the meeting of competition on a "spot" basis is recognized in *FTC v. Sun Oil Co. supra,* 371 U.S. at 523.

The California statute promotes true price competition by preventing Shell from "protect[ing], discriminatorily, sales to one customer at the expense of other customers." *FTC v. Sun Oil Co., supra,* 371 U.S. at 523. The statute gives Shell the "incentive to alter its overall pricing policy" by preventing Shell from meeting challenges to its pricing structure by "wholly . . . individualized responses." *Ibid.*

10. Shell's erroneous claim that the California statute constitutes a "*de facto* allocation of customers" is based on its hypothetical argument that the California statute puts Shell to the "ruinous choice" of losing a customer or making "widespread price reductions to many customers." *See* pages 7-8, *supra.* Furthermore, if Shell cannot afford to meet competition on a "competitive area" basis, it is a less efficient marketer than the competitor and should lose the business.

the California statute clearly is not preempted by the general policy of the Sherman Act.[11]

E. Shell's Attempt to Have This Court Determine the Limitations (if any) to Exxon v. Maryland Is an Improper Request for an Advisory Opinion on an Issue Not Raised in the Instant Case.

Shell's request that this Court adjudicate the limitations (if any) on *Exxon v. Maryland, supra,* and adopt *Parker v. Brown* as a limitation on *Exxon,* is an improper attempt to have this Court render an advisory opinion. Whether the principles established in *Exxon v. Maryland, supra,* apply to state statutes, outside the context of the Robinson-Patman Act, that are shown to have drastic anticompetitive effects or that require conduct that is tantamount to a Sherman Act violation, may or may not be an interesting legal issue suitable for a law review article.[12] And whether the *Parker* doctrine should be adopted as an appropriate limitation to *Exxon v. Maryland, supra,* may or may not present a grand legal question involving the complex interfacing of preemption law and the *Parker* doctrine. This Court may well in the future be presented with a case raising these legal issues; or the matter may never have to be decided.

In the instant case, however, the California statute has the same basic purpose as the federal Robinson-Patman

11. Shell's reliance on Justice Powell's remarks in *United States v. United States Gypsum Co.,* .... U.S. ...., 98 S.Ct. 2864, 2890 (1978) (concurring opn.) is misplaced as the California statute clearly does not require the seller either to lose a customer or reduce prices to *all* buyers. Furthermore, Justice Powell's remarks do not concern preemption of state price discrimination statutes.

12. The state's ability to compel conduct that *violates* the Sherman Act (where the *Parker v. Brown* requirements are met) implies an ability to enact a statute that either falls short of compelling a Sherman Act violation or has an anticompetitive effect.

Act (*cf. Exxon v. Maryland, supra,* 437 U.S. at 132-3). The California statute clearly does not require a violation of the Sherman Act or conduct that is tantamount to a Sherman Act violation. All of Shell's claims of the anticompetitive effect of the California statute are hypothetical, not founded in the record. *See* pages 7-8 and footnotes 6-9, *supra.* The record in this case was developed solely to determine Shell's claim of preemption by the Robinson-Patman Act, not the newly raised claim of preemption by the Sherman Act. *See* page 4 and Part C, *supra.* Thus this is not the proper case to adjudicate the limitations, if any, on *Exxon v. Maryland, supra.*

Furthermore, Shell's claim that the Court of Appeals should have applied the *Parker v. Brown* doctrine is incorrect as that doctrine is applied only when the State directs conduct that *violates* the Sherman Act. Moreover, *Parker v. Brown,* 317 U.S. 341 (1943), even if applicable, does not invalidate the California statute as it clearly constitutes a state legislative mandate. Shell's claim that "ongoing regulatory supervision" is required under *New Motor Vehicle Board v. Orrin W. Fox Co.,* ...... U.S. ......, 98 S.Ct. 403, 412 (1978), is clearly without merit. The California statute is enforced by the State's Attorney General under California Civil Code sections 3369-3370 (and Shell's complaint at ¶ 4 so alleges). There is no reason to require an elaborate bureaucracy be set up for the "state action" doctrine to apply. *New Motor Vehicle Board, supra,* merely requires that a state statute declare a "clearly articulated and affirmatively expressed . . . design . . . to displace unfettered business freedom . . ." for the "state action" exemption to apply. 98 S.Ct. at 412. The California statute clearly does so. Shell takes the reference to "ongoing regulatory supervision" out of its context, which is in a discussion of

whether the state statute loses the "state action" exemption because it accorded private parties (existing dealers) a role in the regulatory process, a problem which is not posed in this case.

Thus, Shell's claim of preemption by the Sherman Act does not warrant certiorari in this case.

F. The Court of Appeals Correctly Rejected Shell's Argument Based on the California Supreme Court's Decision in Rice.

The Court of Appeals correctly rejected Shell's reliance on the California Supreme Court's decision in *Rice v. Alcoholic Beverage Control Appeals Board,* 21 Cal.3d 431, 146 Cal.Rptr. 585, 579 P.2d 476 (1978). *Rice* involved a state-required resale price maintenance scheme under which the liquor manufacturers fixed the minimum price at which retailers could sell liquor. *Rice* invalidated a California statute that *required a violation* of the Sherman Act (resale price maintenance). The California petroleum price discrimination statute does not compel or authorize resale price maintenance or price fixing in violation of the Sherman Act.[13] Thus, even assuming, *arguendo,* that the *Rice* decision could supplant this Court's decision in *Exxon v. Maryland, supra,* the Court of Appeals correctly rejected Shell's argument based on *Rice.*

13. Indeed the California price discrimination statute only regulates the unilateral conduct of Shell and other oil companies. In no way does it compel or authorize Shell to fix prices or divide markets with its dealers, distributors or competitors.

CONCLUSION

For the reasons stated above, respondent George Deukmejian, Attorney General of the State of California, respectfully submits that Shell's petition for certiorari should be denied because it raises no important legal question, the Court of Appeals having correctly rejected Shell's arguments following the principles laid down by this Court last Term in *Exxon v. Maryland, supra.*

Respectfully submitted,

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